Supreme Court, U. S.
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No. 97-1866

In The

Supreme Court of the United States

October Term, 1997

INTERSTATE INDEPENDENT CORPORATION,

Petitioner,

vs.

THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN H. ECKSTEIN
(*Counsel of Record*)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(740) 335-0888
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does the Village of Octa Zoning Ordinance as written, applied or interpreted by the Ohio courts violate the First Amendment of the United States Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Board of Zoning Appeals for Fayette County and the Village of Octa, respectfully requests this court to deny the petition for a writ of certiorari seeking review of a denial of a petition for a writ of certiorari by the Supreme Court of Ohio of a decision of the Court of Appeals, Fayette County, Ohio, upholding a Fayette County, Ohio Court of Common Pleas entry affirming the local Board of Zoning Appeals' decisions denying the petitioner's zoning applications made under the Village of Octa, Ohio Zoning Ordinance.

STATEMENT OF THE CASE

This case arises from the attempts of the petitioner to obtain zoning approval to operate an adult video arcade or, alternatively, a retail clothing and gift boutique on its property located in the Village of Octa, Ohio.

Between January and March 1992, undercover officers with the Fayette County, Ohio, Sheriff's Office and the South Central Ohio Task Force, investigated the adult video arcade operated by the petitioner at 9017 West Lancaster Rd. in Octa, Ohio. On July 15, 1992, based upon evidence of lewd conduct occurring on the premises, the Fayette County, Ohio, Court of Common Pleas determined the arcade was a nuisance. The court issued a permanent injunction, ordered the business closed for one year and ordered all property used in conducting the nuisance to be sold. The Ohio 12th District Court of Appeals affirmed the decision.

On November 13, 1992, while the petitioner's property was closed under the one year closure order, the village enacted a comprehensive zoning ordinance establishing five districts – agricultural, residential, highway service, commercial, and industrial. Three districts are currently in use – agricultural, residential, and highway service. The highway service district defines a permitted use as "any retail business, service establishment or office serving primarily the highway traveler, such as hotels, motels, service stations, gift shops, or restaurants." (Octa Ord. § 10.11, Petitioner's Brief p. 77a). The ordinance does not purport to regulate adult entertainment. On August 8, 1993, the petitioner reopened its adult video arcade without a zoning permit as required under the new ordinance. Two weeks later, on August 20, 1993, the village filed a complaint to enjoin the petitioner for violating its zoning ordinance. The Fayette County, Ohio, Common Pleas Court issued a preliminary injunction.

On September 13, 1993, the petitioner sent the village zoning inspector a letter requesting a zoning permit. The zoning inspector did not act immediately as he believed the letter was not a proper application. On March 22, 1994, the common pleas court permanently enjoined the petitioner from violating the village zoning ordinance. (Petitioner's Brief p. 59a). The Ohio 12th Appellate District concluded that the zoning resolution was constitutional, but ordered the zoning inspector to act upon the petitioner's request for a zoning permit. (Petitioner's Brief p. 43a). On October 24, 1994, just days after receiving the appeals court's order, the zoning inspector complied with the appeals court order to rule on the petitioner's zoning certificate. He denied the application.

Again, the petitioner appealed and again the board of zoning appeals affirmed the inspector's denial.

While petitioner's permanent injunction appeal was pending, it filed additional requests for zoning approval with the zoning inspector. He timely considered each request but consistently denied all but the request to operate a restaurant. The petitioner appealed these denials of the zoning inspector to the Board of Zoning Appeals. Specifically, the petitioner asked the board to consider its applications for conditional use certificates to operate either an adult video arcade or a retail clothing store and gift boutique. The board affirmed the zoning inspector's denial of the petitioner's request by saying that the proposed uses were not principal permitted uses within the highway service district. The board also denied the petitioner's request for conditional use certificates.

The common pleas court consolidated the petitioner's two pending appeals from decisions of an administrative agency, i.e., the board of zoning appeals' denials. The court concluded that the decisions of the board were reasonable and supported by substantial and reliable evidence.

The petitioner appealed the ruling to the Ohio court of appeals contending that an adult video arcade and a retail clothing store and gift boutique were principal permitted uses in a highway service district. The appeals court found that the examples set forth in the zoning ordinance as to principal permitted uses in a highway service area allowed the zoning inspector to interpret its provisions, provided he did so reasonably.

Further, the petitioner contended in its appeal to the Ohio court of appeals that the administrative authorities applied Octa's zoning ordinance unconstitutionally. Specifically, the petitioner argued that the authorities' actions constituted an unconstitutional prior restraint and it was denied any opportunity to operate a speech related business in the village. The appeals court noted that in the previous case it had found the zoning ordinance constitutional as written, as it contained neutral criteria with which to decide if an application may receive a zoning permit, and had a solid foundation for judicial review.

As applied, the appeals court found the zoning ordinance was an ordinance of general application. It therefore was entitled to a presumption of validity requiring the complaining party to come forward with some evidence that a particular administrative decision is based upon an unlawful purpose or that any incidental consequences on First Amendment related activities are unreasonable. The ordinance here does not purport to regulate adult business. Thus, the petitioner had the burden of establishing that the administrative authorities applied the ordinance unreasonably or as an attempt to control or limit the petitioner's First Amendment rights.

The appeals court found the record of the Board of Zoning Appeals' decision showed that the board did not base its decision on the contents of the petitioner's expressive activities. Instead, the board based its decision on the petitioner's failure to demonstrate that its proposed uses were directed primarily at the highway traveler. The board was also concerned with the petitioner's failure to provide the board with any meaningful information about its proposed uses.

Next, the petitioner contended there was no place in the village to operate its speech related business. However, the appeals court found that the petitioner, by its failure to request a zoning certificate in another district, had failed to show that the authorities were likely to prohibit it from distributing its expressive materials in another district. It was also not clear that the board would have denied the petitioner's request for conditional use permits if the petitioner had cooperated with the board by providing it with information about its proposed uses. The appeals court concluded that the petitioner had not established that the administrative authorities had applied the ordinance to deny the petitioner any reasonable opportunity to open its adult business within the village.

The petitioner moved the appeals court to reconsider its entry as the petitioner felt the appeals court had failed to apply *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176 (1981). The appeals court refused to reconsider stating that in *Schad* the ordinance had been construed by the New Jersey courts to provide that "live entertainment," including nude dancing, is "not a permitted use in any establishment" in the borough of Mount Ephraim. *Id.* at 72, 2184, that is, it was not content neutral. This Court was then forced to conclude that Mount Ephraim had failed to adequately justify its substantial restriction of protected activity. *Id.* at 72, 2184.

The Ohio appeals court further stated that in the instant case, the zoning ordinance of the Village of Octa is content neutral. Further, the appeals court stated there was no evidence in the record before it to support the petitioner's allegation that the zoning authorities applied the

village ordinance to restrain protected expression. In conclusion the appeals court found that its disposition of the petitioner's assignment of error is not at odds with *Schad*.

REASONS WHY THE PETITION SHOULD BE DENIED

The rulings of the Ohio court's as shown above are not at odds with any of this Court's cases. The petitioner has failed to place evidence in the record upon which any court could overturn the village ordinance. Further, no further explanation of existing case law would be helpful.

CONCLUSION

The village zoning ordinance was found constitutional as written and as applied. This is so largely as the petitioner has failed to place adequate evidence in the record to permit a court to find it so.

Respectfully submitted,

STEVEN H. ECKSTEIN
(Counsel of Record)
Prosecuting Attorney,
Fayette County, Ohio
214 W. Market St.
Washington Court House,
Ohio 43160-1316
(740) 335-0888
Attorney for Respondent